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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1240

DAN WEISER, et al.,

Petitioners,

v.

HON. MARK WHITE, JR., Secretary of State of The State of Texas

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAN WEISER, et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The applicable order and opion of the district court is set forth in Appendix A, *infra*. The opinion of the court of appeals is unreported (No. 73-4003, January 2, 1975, Appendix B, *infra*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether an appeal from an order of a three judge district court denying an award of attorneys' fees to successful litigants in a Congressional redistricting case lies in the court of appeals or in the Supreme Court.

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, §1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from any order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

Title 28, United States Code, §1291 provides, in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT

Petitioners originally filed suit on October 18, 1971, in the United States District Court for the Northern District of Texas challenging the 1970 reapportionment of the Texas Congressional Districts as violative of Article I, Section 2 of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment. A three-judge court was convened pursuant to 28 U.S.C. §§2281, 2284.

Following trial, the district court held the Texas Congres-

sional apportionment unconstitutional and enjoined elections thereunder. The defendant appealed to the Supreme Court, which stayed the order of the district court (404 U.S. 1065 [1972]), and probable jurisdiction was thereafter noted. 409 U.S. 947 (1972).

This Court affirmed the district court's determination of the unconstitutionality of the Congressional apportionment plan and the enjoining of elections thereunder, but reversed the district court's adoption of one of the alternative plans submitted by the plaintiffs. This Court remanded for implementation of another alternative to the State legislature's apportionment plan. *White v. Weiser*, 412 U.S. 783 (1973).

On remand, plaintiffs filed a motion to commence further proceedings consistent with the judgment of the Supreme Court and for an award of reasonable attorney's fees; no request was made for the attorney's fee issue to be resolved by a court of three judges. The district court conducted further proceedings which resulted in adoption of the original apportionment plan submitted by plaintiffs when the suit was filed. The court taxed all costs against the defendant, but refused to grant plaintiffs' motion for attorney's fees. The district court also denied the intervention motion of Thelma Washington, et al., filed after remand. (Appendix A.)

The defendant Secretary of State did not appeal. Proposed intervenors Washington, et al., filed an appeal in the court of appeals and, also, in this Court from that portion of the district court's order denying intervention. Plaintiffs Weiser, et al., filed an appeal in the court of appeals from that portion

of the district court order denying attorney's fees. The court of appeals consolidated the Washington-Weiser appeals for hearing and decision.

While this case was pending in the court of appeals, this Court dismissed the Washington appeal "for want of an appealable order." *Washington v. White*, 416 U.S. 964 (1974).

After briefing and oral argument the court of appeals dismissed the appeals, stating:

> [W]e hold that jurisdiction for the appeals from the three-judge court orders denying attorney's fees and denying intervention lies only in the Supreme Court under 28 U.S.C.A. §1253, and not in this Court under 28 U.S.C.A. §1291. Having no jurdisction over the subject matter of these appeals, we dismiss. (Appendix B, p. B-13.)

Subject matter jurisdiction was not raised or discussed by the parties in their briefs or by the court of appeals during oral argument or otherwise.

REASONS FOR GRANTING THE WRIT

The court below held that

> " . . . the denial by a three-judge court of an attorney's fees request, *ancillary to the main action and properly before the three-judge court* is not within the jurisdiction of (the court of appeals)." (Emphasis added.) (Appendix B, p. B-2).

This excerpt from the opinion frames the issue to be decided in this case.

The issue is of major importance to the orderly and fair administration of appeals. The holding of the Court below

is in conflict with the recent decision of another circuit[1], and with the rules announced by this Court in analogous cases.[2]

Should this Court determine, however, that the decision of the court of appeals was correct, it should still grant the writ of certiorari and vacate the order of the district court for re-entry to allow a direct appeal to this Court. This action is necessary to avoid the substantial injustice of precluding any review of the important public policy and constitutional issues raised by the district court's denial of attorney's fees.

1. The question presented hereby is one of importance and is likely to recur with frequency.

This Court has on many previous occasions dealt with the problem of which three judge court orders and judgments must be appealed directly to the Supreme Court under 28 U.S.C. §1253.[3] This case falls in the latter category defined in footnote 3, below.

The several circuits have also considered the problem on numerous occasions; however, only two such instances need

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1 *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3240 (October 9, 1974), and still pending. A detailed discussion of the conflict is presented, *infra*.

2 Particularly *Perez v. Ledesma*, 401 U.S. 82 (1971).

3 §1253 has been held inapplicable, generally, in two classes of cases: Where a three judge court was not required, *ab initio*, e.g. *Phillips v. United States*, 312 U.S. 246 (1941); *Moody v. Flowers*, 387 U.S. 97 (1967); and *Board of Regents v. New Left Education Project*, 404 U.S. 541 (1972); Cf. *Zemel v. Rusk*, 381 U.S. 1 (1965); or, if a three judge court was required, the order appealed from was not, or did not include, an order granting or denying a preliminary or permanent injunction against the enforcement of a state "statute" of state-wide application, e.g. *Rockefeller v. Catholic Medical Center*, 397 U.S. 820 (1970); *Mitchell v. Donovan*, 398 U.S. 427 (1970); Cf. *White v. Regester*, 412 U.S. 755 (1973).

be cited herein. (See please Part 2.C. and Part 3., *infra.)*

2. The holding of the court below is erroneous.

When the cases cited in footnote 3, *supra,* are read together, the general rule which emerges is that only those orders of a properly convened three judge district court, made with respect to issues necessarily before the court, and which are, or include, the grant or denial of a preliminary or permanent injunction against the enforcement of a state "statute" of statewide application, are directly appealable under §1253.[4]

a. The order appealed from could have been made by a single judge. Thus, the attorney's fee issue was only *properly,* but not *necessarily* before the three judge court. 28 U.S.C. § 2281; *Perez v. Ledesma,* 401 U.S. 82 (1971); *Public Service Comm'n. v. Brashear Freight Lines,* 312 U.S. 621 (1941).

b. The order appealed from obviously is not, of itself, an order granting or denying a preliminary or permanent injunction. Since plaintiffs prevailed on the merits of the case, and thereby received all the injunctive relief to which they were entitled, they could not have appealed directly to this Court. *Public Service Comm'n. v. Brashear Freight Lines,* 306 U.S. 204 (1939); Cf. *White v. Regester,* 412 U.S. 755 (1973).

c. The issue of entitlement to attorney's fees is entirely separate from the merits of the case which involves the constitutionality of congressional districting in the State of Texas, and thus affords no "independent jurisdictional base". *Perez*

[4] In the interest of pertinence and brevity, reference to congressional enactments and I.C.C. orders is deliberately omitted.

v. Ledesma, supra. Thus, the reliance by the court below on its decision in *Haining v. Roberts,* 453 F.2d 1223 (5th Cir. 1971), is misplaced; and in any event the holdings in that case and this one both conflict with the holding of the court below in *Lee v. Macon County Board of Education,* 429 F.2d 1218 (5th Cir. 1970).[5]

d. The holding of the court below is wholly inconsistent with the policy behind and purpose of §§2281 and 1253. *Phillips v. U.S.,* 312 U.S. 246 (1941); *Goldstein v. Cox,* 396 U.S. 471 (1970).

3. The holding of the court below is in conflict with decisions of this Court and with the decision of another circuit court.

Petitioners submit that the holding of this Court in *Perez v. Ledesma, supra; Brashear I, supra;* and *Brashear II, supra,* are dispositive of the issue; and the conflicting decision of the court below cannot stand.

The decision of the court below also conflicts with *Jordan v. Gilligan,* 500 F.2d 701 (6th Cir. 1974), *petition for cert. filed,* a case in the identical appellate posture as this case, wherein the Court of Appeals for the Sixth Circuit reached and decided the attorney's fee issue without discussion of the

[5] In *Lee,* while the question under review was not the grant or denial of an attorney's fee award, the procedural history of that case was nearly identical to this. The three judge district court in *Lee* previously had been convened to determine the constitutionality of a state-wide statue. The current appeal was from an order implementing a desegregation plan.

In the instant case, the appeal concerned an issue ancilliary to an order implementing an apportionment plan, entered after the three judge court had entered its order and final injunction on the constitutional issue, and after direct review of that order by this Court.

jurisidictional issue presented here. In *Jordan*, as in this case, the constitutional issues previously had been decided and the order appealed from included an order implementing a new, state-wide apportionment plan.

4. Even if the decision below is correct, this Court should remand to allow a direct appeal to this Court.

As noted by Professor Moore, "actions under 28 U.S.C. §2281 . . . have given rise to bewildering problems in the area of appellate review." 9 *Moore's Federal Practice* ¶110.03-[3], p. 70 (1973). While we think the question of appropriate jurisdiction in this case was settled by prior decisions, those decisions indicate a result opposite that reached by the court below. Should this Court deem the decision of the court of appeals correct, a substantial, unforeseen change in the law in this regard will result, thus, precluding review of the district court's decision. Under these circumstances an injustice will occur unless the Court, as it has done in many previous cases, vacates the judgments below and requires that the district court's order denying attorney's fees be re-entered to allow a timely appeal to this Court pursuant to 28 U.S.C. §1253. See, e.g., *Query v. United States*, 316 U.S. 486 (1942); *Moody v. Flowers*, 387 U.S. 97 (1967); *Mengelkoch v. Industrial Welfare Comm'n.*, 393 U.S. 83 (1968); *Mitchell v. Donovan*, 398 U.S. 427 (1970).

A granting of a writ of certiorari for the purpose of allowing a timely appeal in this case is also appropriate due to the important public policy and constitutional considerations raised by the merits for which a decision by this Court will be

needed. The appeal below concerned the propriety and legality of awarding attorney's fees against a State official under the "private attorney general" rationale in light of the proscriptions of the Eleventh Amendment to the United States Constitution. Conflicting decisions already exist in the courts of appeals. See *Skehan v. Board of Trustees*, 501 F.2d 31 (3rd Cir. 1974), *petition for cert. filed*, 43 U.S.L.W.. 3296 (U.S. Nov. 8, 1974); *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3240 (U.S. Oct. 9, 1974); and, holding opposite, *Milburn v. Huecker*, 500 F.2d 1279 (6th Cir. 1974); *Gates v. Collier*, 489 F.2d 298 (5th Cir. 1973), *rehearing en banc granted; Class v. Norton*, 505 F.2d 123 (2nd Cir. 1974); *Jordan v. Fusari*, 496 F.2d 646 (2nd Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974).

CONCLUSION

For the foregoing reasons, Petitioners pray that their Petition for Writ of Cretiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 33, three copies of the foregoing Petition for Writ of Certiorari have been served upon counsel for Respondent, by mailing said copies, postage prepaid, and addressed to

Hon. John L. Hill
Attorney General of Texas
P. O. Box 12548, Capitol Station
Austin, Texas 78711

.....

BEN L. KRAGE

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-5202-D
(Three Judge Court)

DAN WEISER, ET AL,

Plaintiffs

V.

HONORABLE MARK WHITE, JR.
SECRETARY OF STATE OF THE
STATE OF TEXAS

Defendant

MEMORANDUM OPINION AND ORDER

Before INGRAHAM, Circuit Judge, and TAYLOR and HILL, District Judges.

Plaintiffs brought this suit in October of 1971, attacking the constitutionality of Senate Bill No. 1 (hereinafter "S.B. 1") enacted by the Texas legislature which established congressional districts for the State of Texas. Plaintiffs proposed two alternative reapportionment plans which were designated as Plan B and Plan C. Plan B closely followed the congressional boundaries set out in S.B. 1, but reduced the population percentage deviation. Plan C also reduced the population percentage deviations of S.B. 1, but drastically altered the boundaries of the congressional districts.

On January 22, 1972, this court held S.B. 1 to be unconstitutional and adopted Plan C as the apportionment plan establishing the congressional districts for the State of Texas.

On June 18, 1973, the Supreme Court affirmed this court's determination that S.B. 1 was unconstitutional but held that this court erred in adopting Plan C. *White v. Weiser*, ... U.S. ..... (1973). Of particular significance, the Supreme Court stated:

> Given the alternatives, the court should not have imposed Plan C, with its very different political impact on the state. It should have implemented Plan B, which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements.

Plaintiffs have filed a motion to commence further proceedings consistent with the Supreme Court's opinion. Plaintiffs contend that the appropriate action to be taken by this court at this time is the entry of an order implementing Plan B. Since the decision of the Supreme Court, a number of motions to intervene have also been filed on behalf of various designated registered voters who now assert that this court should reopen the case to consider the implementation of apportionment plans other than Plan B. These motions raise two issues. First, under the Supreme Court decision should this court adopt Plan B without further delay? Second, assuming this court is not under a mandate to adopt Plan B, are the motions to intervene timely?

THE ADOPTION OF PLAN B

Plaintiffs contend that the Supreme Court's opinion directs this court to implement Plan B, subject to the enactment of new legislation in accordance with Art. I, §2 of the Constitution, and that consideration of other plans is precluded by

the mandate of the Supreme Court. The State of Texas does not object to Plan B, but, since the filing deadline for candidates in the primary elections is the first Monday in February, it urges the immediate implementation of either Plan B or any other plan that this court may consider appropriate. Plaintiff-intervenor Archer also has no objection to Plan B.

If the opinion and mandate of the Supreme Court leaves no discretion to this court in framing a final decree other than to adopt Plan B, then intervention at this stage of the proceeding would obviously be useless, since the Supreme Court has found Plan B constitutionally acceptable and the prospective intervenors only seek to propose other plans or variations of Plan B which are also constitutionally acceptable.

The State of Texas and the prospective intervenors urge that this court is not bound to implement Plan B since, had it so intended, the Supreme Court could have ordered the implementation of Plan B, rather than remanding for further proceedings consistent with their opinion. It is asserted that the Court's language "Given the alternatives (of Plans B and C)" does not preclude at this time the consideration of apportionment plans other than Plan B. In response to this argument, plaintiffs urge that this case was remanded with no expressed directions to consider other plans of apportionment and that this court should construe the Supreme Court's opinion as a direction to adopt Plan B.

The constitutionality of S.B. 1, Plan B and Plan C have been fully litigated on the merits by this court and by appeal to the Supreme Court. Relitigating the merits of this case

when Plan B has been held to be constitutionally acceptable would require the expenditure of much time by the judiciary and interested parties. Such expenditure is not only unnecessary, but implementation of a plan other than Plan B might well be improper. It is clear that the language of the Supreme Court's opinion does not constitute a directive to relitigate the merits of Plan B or to consider new apportionment plans. In fact, this court concludes that the opinion directs the implementation of Plan B.

THE TIMELINESS OF THE MOTIONS TO INTERVENE

Plaintiffs also argue that the motions to intervene should be denied because of their untimeliness. This court's decision that Plan B should be implemented moots this issue. Nevertheless, this court agrees that the motions to intervene are untimely. All motions to intervene must be "timely," Fed. R. Civ. P. 24, and timeliness is a matter of judicial discretion. *Diaz v. Southern Distilling Corp.*, 427 F.2d 1118 (5th Cir. 1970). Whether an application for intervention is timely depends upon the amount of time that may have elapsed since the institution of the action, whether the movant was in position to intervene at an earlier date and whether intervention is necessary to preserve some right which cannot otherwise be protected. Also, where there has been substantial litigation of the issues in dispute, tardy intervention is usually denied. *Distini v. Cunningham*, 272 F.2d 528 (D.C. Cir. 1959).

This suit was filed on October 19, 1971; a decision was rendered by this court on January 22, 1972, and by the

Supreme Court on June 18, 1973. Apart from any constructive notice, the proceedings of this court and of the United States Supreme Court have been widely reported by the news media. After this suit was filed and before this court's decision, parties intervened as plaintiffs in order to assert their interests. The parties who now seek to intervene had the opportunity to move to intervene while the proceedings were being litigated before this court and the Supreme Court. Courts do not look with favor upon one who, fully aware of what has transpired, nonetheless fails to act on his rights and is unreasonably tardy in filing a petition for intervention to assert those rights. *Arthur McKee & Co. v. Gulf & Western Industries,* 52 FRD 332 (D. Del. 1971). The prospective intervenors have shown no reason why they could not have sought intervention at an earlier date. They now want this court to further consider the adoption of other constitutionally valid congressional apportionment plans while they have, in effect, slept on their rights. *Basle Theatres v. Warner Bros. Pictures Distr. Corp.,* 24 FRD 476 (W.D. Penn. 1959). Having deferred the representation of their interests to others, this court is of the opinion that the prospective intervenors are now precluded from asserting objections to Plan B.

Furthermore, intervention after all the issues have been fully litigated usually has been allowed only when a losing party is unwilling to further prosecute the lawsuit to the detriment of a prospective intervenor. *Hurd v. Illinois Bell Telephone Co.,* 234 F.2d 942 (7th Cir. 1956); *Pellegrino v. Nesbit,* 203 F.2d 463 (9th Cir. 1953). This exception has been narrowly defined to allow intervention only where it is

necessary to preserve some right which cannot otherwise be protected. *Wolpe v. Portsky,* 144 F.2d 508 (D.C. 1944). This exception is inapplicable in this case since plaintiffs have diligently pursued this cause of action and have submitted two alternative plans, one of which has been found to be constitutionally acceptable.

The prospective intervenors also contend that they meet the requirements of timeliness set forth in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129 (1967). In that case, the Supreme Court ordered a divestiture by the defendant of some of its assets and reversed and remanded to the district court for entry of an order of divestiture, *U.S. v. El Paso,* 376 U.S. 651 (1964). The district court had never considered a divestiture plan and several parties then filed motions to intervene in the district court's proceedings as to the form of divestiture. The motions were denied by the district court since "all that remains is to fashion a divestiture decree which complies with the mandate of the Supreme Court." 37 FRD 330, 332. The prospective intervenors then appealed to the Supreme Court and the denial of the motions to intervene was reversed. The Court held that even after entry of judgment and appeal to the Supreme Court and remand to the district court intervention would be timely. The Supreme Court did not discuss the timeliness or the dates that the motions to intervene were filed, but based its decision on the observation that the Supreme Court had a right to protect and to insure obedience to its own previous mandate. Unlike *El Paso,* none of the prospective intervenors in this case have shown the necessity of their presence to

insure obedience to the Supreme Court's mandate. In this respect, *El Paso* is actually authority in this case for the denial of the instant motions to intervene since the Supreme Court has held that this court should have adopted Plan B.

Plaintiffs also request an award of attorney fees for the prosecution of this cause before this court. Plaintiffs have never prayed for any attorney fees in any of their pleadings until the present proceedings before this court. In any event, the award of attorney fees in redistricting cases is discretionary with the court and they are not awarded unless the state's conduct has been shown to have vexations or in bad faith. *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala. 1972). The court is of the opinion that the facts of this case do not support this award of attorney fees. The request for attorney fees is denied.

In conclusion, this court recognizes that the apportionment of congressional districts is a legislative function. A court should only inject itself into the legislative processes when the legislature has defaulted in adopting a constitutionally acceptable apportionment plan. It has been determined in this case that the Texas legislature has failed to enact an apportionment plan which meets the constitutional standards of population equality. It is thus our duty to implement a plan that meets these standards. Plan B achieves this end. Other plans may be equally acceptable or even superior to Plan B, but this court should not attempt to correct errors less than fundamental in a constitutional sense. The Texas legislature, equipped with appropriate procedures and ample

time, is the proper place for the consideration of alternative plans. This court reaffirms the statement in its order of January 22, 1972, that our action in adopting a congressional reapportionment plan is without prejudice to the legislature at a future session implementing a constitutionally acceptable plan other than Plan B. The doctrines of separation of powers and federal-state comity dictate that the competing interests of the prospective intervenors can and should be resolved by state legislative action rather than the judicial processes. But until such a constitutionally acceptable plan is enacted by the legislature and approved as such by this court, Plan B is and shall continue to be the congressional districting plan to be followed in Texas.

For the reasons above set forth; it is ORDERED that:

(1) All motions to intervene are overruled;

(2) Plaintiff's motion for an award of attorney fees is overruled;

(3) Plan C., as set forth in exhibit A and attached to this court's order of January 22, 1972, is hereby withdrawn and Plan B. which is attached hereto is hereby adopted as the plan of congressional apportionment for the State of Texas and said Plan B is hereby declared to be in effect and immediately operative as establishing the congressional districts of the State of Texas; in all other respects this court's order of January 22, 1972, remains unchanged;

(4) This is a final judgment in this case for purposes

of appeal and that no stay of proceedings pending appeal will be granted by this Court;

(5) The clerk of this court shall forward a copy of this order to all attorneys of record, the Governor of the State of Texas, the Lieutenant Governor of the State of Texas, the Speaker of the House of Representative of the State of Texas, the Secretary of State of the State of Texas, and the Attorney General of the State Texas; and

(6) All costs in this court are taxed against the Honorable Mark White, Jr., et etc., defendant.

Dated this 17th day of October, 1973.

JOE INGRAHAM
United States Circuit Judge

WILLIAM M. TAYLOR, JR.
United States District Judge

ROBERT M. HILL
United States District Judge

APPENDIX B

Dan WEISER et al., Plantiffs-Appellants-Appellees,

v.

Honorable Mark WHITE, Jr., Secretary of State of the State of Texas, Defendant-Appellee,

Thelma Washington et al., Movants-Appellants.

No. 73-4003.

United States Court of Appeals,
Fifth Circuit.
Jan. 2, 1975.

Appeals were taken from orders of the United States District Court for the Northern District of Texas, Joe McDonald Ingraham, William M. Taylor, Jr., and Robert M. Hill, JJ., denying motion to intervene and denying award of attorneys' fees. The Court of Appeals, Roney, Circuit Judge, held that Supreme Court of the United States had exclusive jurisdiction of appeals from the orders in question.

Appeals dismissed.

Appeals from the United States District Court for the Northern District of Texas.

Before TUTTLE, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This case consists of two appeals from two separate rulings of a duly constituted three-judge district court which was concerned with the reapportionment of the Texas state legislature. One appeal is from the denial of a motion to intervene, the other from a denial of an award of attorney's fees

to the original successful plaintiffs. We hold that the Supreme Court of the United States has exclusive jurisdiction of appeals from orders of this nature by a three-judge court, and dismiss both appeals for lack of jurisdiction in this Court.

We have previously held that an appeal from the denial by a three-judge court of an attorney's fee request, ancillary to the main action and properly before the three-judge court, is not within the jurisdiction of this Court. Haining v. Roberts, 453 F.2d 1223 (5th Cir. 1971), cert. denied, 406 U.S. 948, 92 S.Ct. 2054, 32 L.Ed.2d 336 (1972). Although that case involved a class action for discharge for refusal to sign a loyalty oath by plaintiffs who sought job reinstatement and back pay, we see no distinction between that case and this one which would weaken it as the controlling authority here.

The appeal from the denial of intervention presents us with a slightly different problem because there appears to be no case in this Court directly in point. The appellants-intervenors filed simultaneous appeals to this Court and to the Supreme Court. The Supreme Court has already dismissed the appeal to it. Washington v. White, 416 U.S. 964, 94 S.Ct. 1985, 40 L.Ed.2d 554 (1974). Intervenors argue that since the Supreme Court dismissed their appeal, this Court must have appellate jurisdiction in order for them to have some forum for review of the district court's denial of their motion to intervene. Even if such an argument could have force in determining the presence of jurisdiction in this Court, we view the Supreme Court's dismissal of intervenors' appeal as a decision on the merits, not a decision that it lacked jurisdiction.

This case has been before the courts for some time. A detailed statement of facts is set forth in the Supreme Court's opinion on an earlier appeal. White v. Weiser, 412 U.S. 783, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973). Briefly, Weiser and others originally filed suit in the United States District Court for the Northern District of Texas against the Secretary of State of Texas challenging the reapportionment of the Texas legislature under Texas Senate Bill 1 (S.B. 1), as a violation of the "one-man, one-vote" principle of Article I, Section 2 of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment. A three-judge district court was convened. See 28 U.S.C.A. §§ 2281, 2284.

After receiving evidence and hearing argument, the court found the legislature's plan of apportionment unconstitutional and ordered the adoption of one of the two alternative plans of apportionment that Weiser had presented to the three-judge panel, called Plan C. That order was stayed by the Supreme Court upon application of the Secretary of State. 404 U.S. 1065, 92 S.Ct. 750, 30 L.Ed.2d 775 (1972). On appeal, the Supreme Court affirmed the district court's finding of unconstitutionality of S.B. 1, the Texas legislative plan. It reversed the three-judge court's order adopting Plan C, however, because of that plan's deviation from the state policy embodied in S.B. 1. The Supreme Court noted that Plan B was constitutional, followed more closely the desires of the Texas legislature, and that, as between the two choices, Plan B should have been adopted rather than Plan C. The case was "remanded for further proceedings consistent with this opinion." 412 U.S. at 797, 93 S.Ct. at 2356.

On remand, appellants for the first time sought leave to intervene. Desiring to challenge the composition of one of the 24 districts included in the plan, they alleged a denial of equal protection and the right to vote to black citizens of that district, an issue not previously litigated in the suit. The district court ruled that the Supreme Court had effectively ordered the adoption of Plan B. In view of this, it denied the motion to intervene on the ground that, whether considered as an assertion of a right to intervene or only as a request for permissive intervention, the motion was untimely under Rule 24, F. R. Civ. P. The Secretary of State did not appeal the adoption of Plan B. Appellants having no standing to appeal the merits of the three-judge decision, filed concurrent appeals to this Court and to the Supreme Court from the denial of their intervention. The Supreme Court dismissed their appeal to that court "for want of an appealable order." Washington v. White, 416 U.S. 964, 94 S.Ct. 1985, 40 L.Ed. 2d 554 (1974).

Direct appeals to the Supreme Court from a properly constituted three-judge court are under 28 U.S.C.A. § 1253:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

The Supreme Court has not decided whether an unsuccessful applicant for intervention is "any party" appealing an order of a three-judge court "granting or denying" an injunction, as

contemplated by § 1253. Oregon State Elks Ass'n v. Falkenstein, 409 U.S. 1032, 1033, 93 S.Ct. 530, 34 L.Ed.2d 484 (1972) (Douglas, J., dissenting from denial of stay pending appeal), appeal dismissed, 409 U.S. 1099, 93 S.Ct. 907, 34 L.Ed.2d 681 (1973). This Court likewise has not decided the precise issue. But we have decided that some collateral matters dependent upon the injunction suit, which are not the actual grant or denial of an injunction, are appealable only to the Supreme Court. *See* Haining v. Roberts, *supra*. While the answer is far from clear, we think that the orderly process of judicial administration requires that any appeal from the denial of intervention by a properly constituted three-judge district court must be to the Supreme Court, and not this Court. The Eighth Circuit has reached this same conclusion. *See* Doe v. Turner, 488 F.2d 1134 (8th Cir. 1973) (dismissing appeal); Benson v. Beens, 456 F.2d 244 (8th Cir. 1972) (dismissing appeal). *But see*, Petuskey v. Rampton, 431 F.2d 378 (10th Cir. 1970), cert. denied, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971).

The wisdom of this approach is clearly demonstrated by the situation in the instant case. The critical issue in deciding that intervenors' motion was untimely is whether the Supreme Court's decision and remand on the initial appeal mandated the adoption of Plan B, or whether the district court was free to consider any other plans which might then be offered. If the Supreme Court's decision effectively directed the adoption of Plan B, there is nothing to be achieved by allowing intervention by other parties. Denied intervention, they would be free later to litigate the issues assetrted by

them without the spectre of *res judicata* hanging over them. There could be no abuse of discretion by the district court. If, on the other hand, the question of what the ultimate plan should be still open after remand, it might be that intervenors could represent a diffrent view that should have been considered by the district court. This might possibly result in an abuse of discretion in not allowing intervention, regardless of the timing.

For this Court to review the district court's decision for an abuse of discretion, we would be required to construe the mandate of the Supreme Court issued directly to the district court. Such procedure would subvert the settled principle that a mistake in construction of a mandate should ordinarily be corrected by the court who issued the mandate, In re Sanford Fork & Tool Co., 160 U.S. 247, 255, 16 S.Ct. 291, 40 L.Ed. 414 (1895), a principle the Supreme Court has gone to some length to enforce. *See* Utah Public Service Comm'n v. El Paso Natural Gas Co., 395 U.S. 464, 89 S.Ct. 1860, 23 L.Ed.2d 474 (1969).

An analogous direct appeal statute applies to certain antitrust cases.

> In every civil action brought in any district court of the United States under any of said [antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

15 U.S.C.A. § 29.

In construing this statute, the Supreme Court, considering the policy behind the direct appeal procedure, has viewed its

jurisdiction on direct appeal as being somewhat broader than the statute's language might seem to require. *See, e. g.*, Tidewater Oil Co. v. United States, 409 U.S. 151, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972) (finding the "final judgment" of 15 U.S.C.A. § 29 to include a "controlling question" appealed under 28 U.S.C.A. § 1292(b)); United States v. California Co-operative Canneries, 279 U.S. 553, 49 S.Ct. 423, 73 L.Ed. 838 (1929) (finding jurisdiction under the Expediting Act to review the denial of intervention). *See generally* 3B Moore's Federal Practice, ¶24.15 (1969). The Supreme Court seems to recognize that some issues are so dependent upon the controlling issue in a case and are so involved with the purpose behind the direct appeal provisions, that, for proper review, all issues should go to the court with jurisdiction over the main issue. This concept remains as valid when the main appeal lies to the Court under 28 U.S.C.A. § 1253, as when it comes under 15 U.S.C.A. § 29.

There is sparse authority on the point. Apparently the only direction given us by the Supreme Court as to what orders of a three-judge district court may be appealed to a court of appeals lies in its decision that denial of three-judge jurisdiction should be reviewed by the court of appeals, and not the Supreme Court. *See* Wilson v. City of Port Lavaca, 391 U.S. 352, 88 S.Ct. 1502, 20 L.Ed.2d 636 (1968); Mayhue's Super Liquor Store, Inc. v. Meiklejohn, 426 F.2d 142, 144-146 (5th Cir. 1970).

As discussed in *Mayhue Liquor* the apparent justification for limited jurisdiction in this Court in such a situation is this:

once the district court panel decides it was improperly convened, the dismissal order is the functional equivalent of a single judge order refusing to convene a three-judge court in the first instance. The court of appeals should consider such action just as it would an order to the same effect actually entered by a single judge. Schackman v. Arnebergh, 387 U.S. 427, 87 S.Ct. 1622, 18 L.Ed.2d 865 (1967).

The reason behind this limited court of appeals jurisdiction to review such a three-judge order does not support the assertion that we have jurisdiction to consider the denial of intervention. The question of intervention is generally too intertwined with the judicial review of the merits of litigation to justify our exercise of jurisdiction in possible derogation of the Supreme Court's authority. Without clear direction from the Supreme Court that this piecemeal approach is required by our various appellate jurisdiction statutes, we decline to define our jurisdiction under 28 U.S.C.A. § 1291 to require such a result.

Intervenors assert that the Supreme Court has eschewed jurisdiction in this very case, which we should take as a signal that this Court has jurisdiction over this appeal. It is often difficult to decipher the cryptic meaning of the short orders with which the Supreme Court frequently disposes of matters within its mandatory appellate jurisdiction. We do not view, however, that Court's dismissal of intervenors' appeal as evincing a decision that it lacked jurisdiction under §1253.

The complete order of the Supreme Court on intervenors' appeal is found among the several dismissal orders entered on

April 29, 1974, many of which dismissed "for want of a substantial federal question," or "for want of jurisdiction." This one provides as follows:

> No. 73—6459. Washington , et al. v. White, Secretary of State of Texas, et al. Appeal from D.C.N.D. Tex. dismissed for want of appealable order.

It can be immediately assumed that, had the Supreme Court dismissed the case "for want of jurisdiction," it would have said so. The dismissal was not "for want of jurisdiction," but "for want of an appealable order." *Compare* Shenandoah Valley Broadcasting, Inc. v. ASCAP, 371 U.S. 540, 83 S.Ct. 519, 9 L.Ed.2d 508 (1963) *with* Washington v. White, 416 U.S. 964, 94 S.Ct. 1985, 40 L.Ed.2d 554 (1974). Furthermore, the Supreme Court did not rule on the intervenors' alternative request to treat the appeal as a petition for writ of certiorari. *Compare* Cole v. California, 416 U.S. 964, 94 S.Ct. 1985, 40 L.Ed.2d 554 (1974). We conclude that the reason the Supreme Court did not rule on such request is that its dismissal was actually an adjudication of the merits of appellants' attempt to intervene under the direct appeal route to that court, thus making unnecessary a ruling as to whether certiorari jurisdiction should be granted.

Over the years an anomalous rule has evolved in the federal appellate courts concerning the appealability or non-appealability of an order denying intervention. The denial of leave to intervene when the applicant had an absolute *right* to intervene is appealable, but a denial of a motion for *permissive* intervention is not appealable, unless there is an abuse of discretion. Martin v. Kalvar Corp., 411 F.2d 552 (5th Cir.

1969). This rule requires a merit review of any claim of intervention in order for an appellate court to determine whether or not the district court's order is appealable. *See* Hodgson v. United Mine Workers of America, 153 U.S. App. D.C. 407, 473 F.2d 118, 127 n. 40 (1972). If the appellate court finds either that a claim of right to intervene was without merit or that the request for permissive intervention was denied without an abuse of discretion, the action of the district court is not appealable, the appellate court has no jurisdiction, and the appeal should be dismissed. But if the court decides that appellant was correctly alleging a right to intervene or that refusal of permissive intervention constituted an abuse of discretion, the order is appealable and the court has appellate jurisdiction to consider the denial by the lower court. The trial court should be reversed unless the assertion of right to intervene was untimely. This rule's rationale lies in the effect the grant or denial of intervention has upon the rights of the various parties. Absent an absolute right to intervene or an abuse of discretion by the district court, the intervenors are free to litigate their issues in subsequent proceedings and are not prejudiced by any order the court might enter on the merits of the litigation. The denial is therefore not appealable. The Supreme Court articulated the rationale for this rule in Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947), wherein it had postponed consideration of the question of its jurisdiction to review the order to the hearing of the appeal upon the merits:

> Ordinarily, in the absence of an abuse of discretion, no

appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. United States v. California Co-op. Canneries, 279 U.S. 553, 556, 49 S.Ct. 423, 424, 73 L.Ed. 838. The permissive nature of such intervention necessarily imples that if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability. But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom. *See* Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 508, 61 S.Ct. 666, 668, 85 L.Ed. 975.

Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it. In other words, our jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance. We must therefore determine the question of our jurisdiction in this case by examining the character of the Brotherhood's right to intervene in the proceeding brought under § 16-(12) of the Interstate Commerce Act.

Id. at 524-525, 67 S.Ct. at 1390 (footnote omitted). *Compare*

Sam Fox Publishing Co. Inc. v. United States, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961) *with* Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., *supra,* and Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 64 S.Ct. 905, 88 L.Ed. 1188 (1944); *see* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 159, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967) (Stewart, J., dissenting).

This seemingly inconsistent approach of reaching the merits to determine jurisdiction has lead at least one federal Court of Appeals to "assume" jurisdiction on review of intervention denials, regardless of the ultimate merit determination, *see* Ionian Shipping Co. v. British Law Ins. Co., 426 F.2d 186, 188-189 (2d Cir. 1970).

Nonetheless, it is clear that the Supreme Court sometimes reaches the merits before it dismisses an appeal. We view its disposition of intervenors' appeal as reflecting such a circumstance. The district court denied the motion to intervene on alternative grounds: (1) the Supreme Court had mandated the adoption of Plan B, and, therefore, intervention could not affect the ultimate disposition of the suit, and (2) even if further proceedings would be appropriate, the motion was untimely, irrespective of whether the motion was for intervention of right or merely for permissive intervention. Considering the approach taken by the Supreme Court in review of intervention rulings, it seems apparent that its dismissal "for want of an appealable order" here meant that either there was no intervention of right or the discretionary determination of untimeliness was not an abuse of the district court's authority.

It can be noted that the determination of whether an order is appealable to this Court turns on the same factors as those which control the Supreme Court's decision. If our jurisdiction were otherwise clear, we would have been faced with the same decision as faced the Supreme Court. Had we reached the same conclusion, the appropriate action for this Court would likewise have been to dismiss "for want of an appealable order." This leaves intervenors free to protect their interest "in some more appropriate proceeding." 331 U.S. at 524, 67 S.Ct. 1387.

In any event, we hold that jurisdiction for the appeals from the three-judge court orders denying attorney's fees and denying intervention lies only in the Supreme Court under 28 U.S.C.A. § 1253, and not in this Court under 28 U.S.C.A. § 1291. Having no jurisdiction over the subject matter of these appeals, we dismiss.

Appeals dismissed.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-1240

* * *

DAN WEISER, ET AL.,
Petitioner

V.

HONORABLE MARK WHITE, JR.,
SECRETARY OF STATE OF THE
STATE OF TEXAS,
Respondent

* * *

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

OPINION BELOW

The Opinion of the District Court is set forth as

Appendix A of the Petition. The Opinion of the Court of Appeals for the Fifth Circuit is unreported and set forth in Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS HAD JURISDICTION TO ENTERTAIN AN APPEAL FROM AN ORDER OF A DULY CONVENED THREE-JUDGE COURT DENYING A REQUEST FOR AN AWARD OF ATTORNEY'S FEES ANCILLARY TO THE MAIN ACTION AND PROPERLY BEFORE THE THREE-JUDGE COURT.

STATUTE INVOLVED

Title 28, United States Code, Section 1253 provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from any order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges."

Title 28, United States Code, Section 1291 provides in pertinent part:

> "The courts of appeals shall have jurisdiction of appeals from all final decision of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

STATEMENT

On June 17, 1971, Senate Bill 1 passed by the 62nd Legislature of the State of Texas was signed into law by the Governor of the State of Texas. This Bill contained the congressional redistricting for the State of Texas. Suit was instituted on October 18, 1971, by Petitioner Dan Weiser, et al., on behalf of himself and all others similarly situated as citizens and voters of the State of Texas, to declare Senate Bill 1 unconstitutional and invalid as a violation of their rights under Article I, Section 2, United States Constitution and the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs sought to enjoin elections for Congress under the districts contained in Senate Bill 1. A three-judge court was convened and on January 22, 1972 declared Senate Bill 1 unconstitutional in that it contained impermissible variations in population among the congressional districts and therefore contravened Article I, Section 2 of the United States Constitution. The Court adopted an alternative plan for congressional apportionment which had been urged by Plaintiffs, referred to as Plan C. The Defendant appealed, and the Supreme Court noted jurisdiction.

On June 18, 1973, this Court affirmed the lower court's declaration that the congressional districts as drawn in Senate Bill 1 were unconstitutional, but reversed that portion of the judgment adopting Plan C and remanded the case to the lower court for further proceedings. White v. Weiser, 412 U.S. 783 (1973).

On remand Petitioner requested an award of attorney's fees and in addition a number of motions were submitted to the three-judge court requesting leave to intervene. After a hearing the three-judge court issued its opinion on October 17, 1973, holding that the Supreme Court had mandated the adoption of Plan B, an alternative plan originally submitted but later abandoned by the Petitioners, that Intervenors' applications were untimely, that costs be taxed against the Defendant, and denied Petitioners' motion for award of attorney's fees.

Appeals were taken to the Court of Appeals for the Fifth Circuit by Petitioner and proposed Intervenor Washington, et al., from that part of the order denying attorney's fees and denying the intervention, respectively. The appeals were consolidated by the Court of Appeals. Proposed Intervenor Washington, et al., undertook a direct appeal to this Court, which was dismissed "for want of an appealable order". Washington v. White, 416 U.S. 964 (1974).

The Fifth Circuit dismissed the consolidated appeal for lack of jurisdiction under 28 U.S.C. 1291 and 28 U.S.C. 1253.

ARGUMENT

I. THE FIFTH CIRCUIT COURT OF APPEALS DID NOT HAVE JURISDICTION TO ENTERTAIN AN APPEAL FROM AN ORDER OF A DULY CONVENED THREE-JUDGE COURT DENYING A REQUEST FOR AN AWARD OF ATTORNEY'S FEES ANCILLARY TO THE MAIN ACTION AND PROPERLY BEFORE THE THREE-JUDGE COURT.

Pursuant to 28 U.S.C. Section 2281, a three-judge court was required to consider the constitutionality of the Texas plan for congressional districts and Petitioners' request for injunctive relief. On direct appeal to this Court from the order granting injunctive relief, the case was remanded to the three-judge court for further proceedings consistent with the opinion. On remand one of the issues raised by Petitioner for consideration by the three-judge panel was a request for an award of attorney's fees. Consideration of this issue by the panel was appropriate and proper as stated by the Fifth Circuit Court of Appeals in Haining v. Roberts, 453 F.2d 1223, 1224 (5th Cir. 1971) cert. denied, 406 U.S. 948 (1972);

> "It was appropriate that the three-judge court decide both the attorney fee and the back pay claims. They are not even separate legal issues but simply aspects of the overall relief sought by the appellant based solely on the claim of wrongful discharge."

The instant claim for attorney's fees is part of and

based on the original injunction request. It is no more than an "aspect of the overall relief" sought by the Petitioner on his constitutional claim. Petitioner bases his entitlement to attorney's fees on the single "private attorney general" theory. Such an award on this basis, rather than the traditional contractual or statutory grounds, is inherently intertwined with the merits of the constitutional claim.

On remand, no question was raised as to the propriety or necessity of the three-judge panel's consideration of the issues then before it. Petitioner at no time requested that the three-judge court dissolve itself and only one judge consider the merits of his request for an award of attorney's fees or any other issue. It must be assumed then that Petitioner himself was of the opinion that a decision on his request was properly before and should be decided by the three-judge panel as previously held in Haining, supra.

Petitioner mistakenly relies on Perez v. Ledesma, 401 U.S. 82 (1971) and Public Service Commission v. Brashear Freight Lines, 312 U.S. 621 (1941), hereinafter referred to as Brashear II, to support his contention. In the instant case, this Court remanded the original action to the three-judge court for further proceedings consistent with the opinion. The panel was therefore instructed to take some further action. Petitioners' additional request for an award of attorney's fees was proper under the circumstances.

To put Brashear II, supra, in proper perspective, the circumstances leading up to the issuance of

that opinion must be examined. A three-judge panel was originally convened to consider a petition for an injunction against the enforcement of a state statute. The action of the three-judge panel was terminated with the filing of its opinion and order in the first proceeding. An appeal from that order was dismissed for lack of jurisdiction by this Court in Public Service Commission v. Brashear, 306 U.S. 204 (1939), hereinafter referred to as Brashear I. There was no further action to be taken by that three-judge court; no mandate of this Court to be followed. After the dismissal of the appeal, the Public Service Commission, in effect, filed a new suit for damages with the three-judge court, even though the original ruling of that court clearly indicated that an independent action was the proper course for the Public Service Commission to obtain relief:

> " 'That the issue raised by the Defendants' counterclaim, not having been urged nor presented by the parties, and the Court being in doubt as to the right of the Defendants to maintain such a counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the Defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them, shall be so advised;' " Brashear I, supra, page 206.

As pointed out in the opinion of this Court in Brashear II, a dismissal of the three-judge panel would have been proper, with the merits of the claims for damages to be decided by one judge only.

312 U.S. at 625. The taking of an appeal from the second order of the three-judge panel denying the requested relief to the Circuit Court of Appeals rather than the United States Supreme Court was proper. As pointed out by this Court in Brashear II, the original dismissal by the three-judge panel was without a hearing on the merits. 312 U.S. at 626. This type of decision is one of the very limited areas in which an order of a three-judge court is properly reviewable by the appropriate court of appeals rather than by direct appeal to the United States Supreme Court. 9 Moore's Federal Practice Sec. 110.03(3), page 7677 (1973). In contrast, the three-judge panel in the case at bar considered and ruled on the merits of the issue, which issue was part and parcel of the original proceedings.

In Perez v. Ledesma, supra, the order sought to be reviewed on direct appeal and dismissed for want of jurisdiction by the United States Supreme Court was one entered by a single judge on the constitutionality of a local ordinance. The lack of Supreme Court jurisdiction on direct appeal in this instance is classic in nature. The issue of constitutionality of a local ordinance was not even properly before the three-judge court, as that court recognized by the entry of the order regarding the ordinance by a single judge only.

Petitioner also erroneously relies on Perez to support his contention that the "issue of entitlement to attorney's fees is entirely separate from the merits of the case which involves the constitutionality of congressional districting in the State of Texas and thus affords no 'independent jurisdictional basis.' "

(Petition, page 6.) As stated above the issue of attorney's fees, especially on the theory which Petitioner claims entitlement--private attorney general --and in the posture of this litigation was far from entirely separate from the merits of the injunction proceedings. Haining v. Roberts, supra. As such, the "independent jurisdictional base" requirement of Perez is wholly inapplicable especially when the controversy between parties there was centered on an ordinance complete in itself and totally separate from the challenged State law.

Even if Petitioner's contention that the attorney's fees issue in the context of this case was wholly separate from the merits of the injunction proceeding and required an independent jurisdictional base for consideration by a three-judge court were correct, it was his burden to request that the issue be determined by a single judge, or, in the alternative, to take a direct appeal to this Court. If the three-judge court had no jurisdiction, this Court alone had the ability on a direct appeal to vacate the order of the three-judge court with instructions to enter a new order by a single judge regarding attorney's fees.

Petitioner himself cites Professor Moore as to the many problems which have surrounded appellate review from three-judge court actions (Petition, page 8). Professor Moore, however, also admonishes an appellant that ". . . the safe course is to file an appeal in both the Supreme Court and the Court of Appeals whenever there is any doubt about the necessity for a three-judge court." 9 Moore's Federal Practice Sec. 110.03(3) page 83 (1973).

The prudence of taking such appeals has also been cited by the Court of Appeals for the Fifth Circuit. Mayhue's Super Liquor Store, Inc. v. Meiklejohn, 426 F.2d 142 (5th Cir. 1970). Proposed Intervenors Washington, et al. were aware of and heeded such admonitions. Petitioner chose to ask this Court to correct his mistake, not the mistake of the Court below. It is not the responsibility of the Court of Appeals or of this Court to render such assistance and the Petition for Writ of Certiorari should be denied.

II. THE OPINION OF THE COURT BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT, THE COURT BELOW, OR OTHER COURT OF APPEALS.

Petitioner contends that the holding of the court below conflicts with Perez v. Ledesma, Brashear I, and Brashear II. Brashear I merely stands for the proposition that the appellant had no standing to pursue a direct appeal to the United States Supreme Court from the decree of a three-judge court which denied an injunction as requested by Appellant. The case does not touch in any way the question of whether the Court of Appeals would have had jurisdiction to entertain the appeal. The fact that the appellant in that case attempted to pursue further proceedings for relief in the three-judge district court rather than the Circuit Court of Appeals, as discussed in Point I, supra, further points out that the holding in the Supreme Court was not regarded as conferring jurisdiction on the Circuit Court.

Perez and Brashear II are equally distinguish-

able from and not inconsistent with the instant case as discussed in Point I above.

Nor does this case conflict with Lee v. Macon County Board of Education, 429 F.2d 1218 (5th Cir. 1970). The Court of Appeals for the Fifth Circuit itself has resolved the jurisdictional questions between Lee and the instant case. In Lee the Court stated:

> "The orders appealed from are those of the three-judge District Court, i.e., the order of that Court dated March 16, 1970 (modified March 23, 1970) in the Anniston case, and the order of that Court dated March 26, 1970 in the Tuscaloosa case. It is appropriate that these appeals from the three-judge District Court be heard by this Court of Appeals which has jurisdiction rather than the Supreme Court, since there are no proceedings here concerned with the constitutionality of a state statute, and no 28 U.S.C. Sec. 2281 issues involved. See 28 U.S.C. Sec. 1291; 28 U.S.C. Sec. 1253. Cf. United States v. State of Georgia, et al. (Charlie Ridley, Jr., et al., Intervenors), 5 Cir., 1970, 428 F.2d 377." Lee v. Macon County Board of Education, supra, p. 1219, footnote 2.

As set out in Point I, supra, in Haining v. Roberts, supra, a case identical to the instant one, the court held that the issues to be resolved were a part of the injunction suit required to be heard by the three-judge court. The Court of Appeals was therefore

without jurisdiction to entertain an appeal from the order of the three-judge court.

Finally, the posture of Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974) petition for cert. filed, is totally different from that of the instant case. In that case, a three-judge court was convened pursuant to 28 U.S.C. Sec. 2281 to consider the constitutionality of a plan reapportioning the Ohio Legislature. On December 3, 1971, that three-judge panel ruled the plan unconstitutional, and no appeal was taken from the decision. On April 19, 1972, Petitioner moved for an award of counsel fees and expenses. The matter was referred to the original district court judge, Chief Judge Battisti, who ordered the payment of attorney's fees by the Defendants on May 19, 1972. On February 22, 1973, Defendants moved to vacate previous orders of the single judge, which motions were overruled on June 12, 1973. That order of a single judge was properly appealed to the Sixth Circuit. See Jordan v. Gilligan, (Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, pages 4, 5, 1a, 2a, and 3a). The Sixth Circuit, therefore, had no jurisdictional questions to consider.

III. THE ISSUE OF AN AWARD OF ATTORNEY'S FEES IN THIS CASE PRESENTS NO SUBSTANTIAL CONSTITUTIONAL QUESTION.

Peititoner's request for an award of attorney's fees as stated above was based on the private attorney general theory. The three-judge court denied this request solely on the basis that an award of at-

torney's fees is discretionary and the facts of the case did not support an award of attorney's fees. (Petition, page A7) Petitioner is not claiming that he has a constitutional right to attorney's fees pursuant to the private attorney general theory. Although Petitioner implies that this case involves the legality of awarding attorney's fees under the private attorney general theory in light of the Eleventh Amendment to the United States Constitution, (Petition, page 9) no such important policy and constitutional consideration exist in this case. Based on the clear holding of the three-judge panel, even if the Eleventh Amendment to the United States Constitution is held not to prohibit an award of attorney's fees against the State, Petitioner would not be entitled to such an award on the facts of this case.

CONCLUSION

For the foregoing reasons, Respondents pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth Levatino, First Special Assistant Attorney General of the State of Texas, certify that a true and correct copy of the foregoing Brief for Respondent in Opposition has been served upon counsel by mailing same, postage prepaid, to: Mr. Ben L. Krage, Rosenberg, Kasmer & Willingham, 2300 Main Tower, 1200 Main Street, Dallas, Texas 75202; Mr. Lawrence Fischman, Weil, Craig & Fischman, 2400 Adolphus Tower, Dallas, Texas 75202

on this the _____ day of May, 1975.

ELIZABETH LEVATINO